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No. 01-584

In the
Supreme Court of the United States

WANDA ADAMS, et al.,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation, respectfully submits this brief amicus curiae in support of Respondents Florida Power Corporation and Florida Progress Corporation. All parties consented to the filing of this brief and their letter of consent has been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF considers this case to be significant in that it concerns the scope of disparate impact, a doctrine that is often counterproductive to the public interest.

STATEMENT OF THE CASE

This Court granted certiorari to determine the following question:

> Is the disparate impact method of proving age discrimination available to plaintiffs suing under the Age Discrimination in Employment Act?

The facts of this case are simply stated. Florida Power Corporation (FPC) is a publicly-regulated electric utility. After the enactment of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, FPC terminated the Plaintiffs during a series of corporate reorganizations for the claimed purpose of maintaining its competitiveness in the newly deregulated market. The Plaintiffs sued FPC and its parent company on the basis that FPC had discriminated against them because of their age in violation of the Age Discrimination in Employment Act

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq.* The United States District Court for the Middle District of Florida ruled that as a matter of law the disparate impact theory of liability is not available under the ADEA. The district court then certified this issue to the Eleventh Circuit. *Adams v. Florida Power Corporation*, 255 F.3d 1322, 1323 (11th Cir. 2001). The Eleventh Circuit affirmed that disparate impact claims may not be brought under the ADEA. *Id.* at 1326. This Court granted certiorari.

SUMMARY OF ARGUMENT

The wording of the ADEA shows Congress intended to address only intentional discrimination on the basis of age and not policies or acts that merely have a disparate impact. This Court developed disparate impact analysis to combat the vestiges of intentional discrimination and not mere statistical disparities.

It has been administrative agencies and the courts that implemented disparate impact liability. Congress has only sought to limit its application. This Court has also sought to limit disparate impact liability by requiring proof of intentional discrimination in Equal Protection Clause cases.

Public policy considerations counsel against any expansion of disparate impact liability. Disparate impact is based on administrative regulations that contravene the intent of Congress. Requiring proportional impact leads to implementation of quota systems. Lastly, the disparate impact doctrine is subject to abuse that exacerbates the societal problems it was intended to remedy.

ARGUMENT

I

NEITHER CONGRESSIONAL INTENT NOR THIS COURT'S PRECEDENTS JUSTIFY DISPARATE IMPACT LIABILITY UNDER THE ADEA

A. This Court Has Suggested That the ADEA Encompasses Only Disparate Treatment

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq.*, provides in pertinent part:

> (a) . . . It shall be unlawful for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .
>
> . . . .
>
> (f) . . . It shall not be unlawful for an employer . . . .
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . .

29 U.S.C. § 623.

The issue is whether this language authorizes disparate impact liability. This Court noted in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that it has long "distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." *Id.* at 609.

> Disparate treatment . . . is the most easily understood type of discrimination. The employer

simply treats some people less favorably than other because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .

> Claims that stress disparate impact [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory.

Id. (internal quotation marks omitted).

This Court has thus made clear that the disparate treatment theory is available under the ADEA. *Id.* "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Id.* at 610. As this Court explained:

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.

Id.

While this Court specifically stated that it was not deciding whether a disparate impact theory of liability is available under the ADEA, *id.* at 610, its language in *Hazen Paper* strongly suggests that the answer is no. This Court declared:

> Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

Id. at 611 (citation omitted).

This Court explained: "When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* The essence of the disparate impact theory is the correlation of a facially neutral factor with the protected status. Thus, the mere fact that conduct motivated wholly by factors other than age falls more heavily on the protected age group does not give rise to an ADEA violation. As this Court explained, ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore." *Id.* at 612.

B. Disparate Impact Liability Was Developed to Combat Intentional Discrimination; Mere Statistical Disparity Does Not Constitute Discrimination

The doctrine of "disparate impact" saw its initial judicial application in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There this Court ruled that an employer's requirement that job applicants have completed high school and pass a general intelligence test discriminated against blacks in violation of Title VII, 42 U.S.C. §§ 2000e, *et seq.* (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin), because it excluded a higher proportion of blacks than whites and was not demonstrably related to actual ability to do the work. *Griggs*, 401 U.S. at 431-32. The ruling

in *Griggs* was clearly influenced by the fact that the employer had a history of overt racial discrimination which had apparently ceased after the enactment of the Civil Rights Act of 1964, although the employer continued to follow policies that had a markedly disproportionate effect on blacks. *Id.* at 428-29. *Griggs* created the following standard: "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . . If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. Although this Court attempted to qualify the standard,[2] that attempt has often been ignored by the lower federal courts.

C. The Sole Rationale for Disparate Impact Is Preventing Pretexts for Discrimination

The only legitimate purpose behind the development of the disparate impact theory would be to prevent the use of facially neutral standards as a pretext for racial discrimination, not to require race quotas. This was made clear in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989):

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review *would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.*

Id. at 659 (emphasis added).

[2] Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

This Court reemphasized this point in noting that plaintiffs could show that other selection devices without a similarly undesirable impact would also serve the defendant's legitimate interests. By such a showing, the plaintiffs "would prove that [defendant was] '*using [its] tests merely as a "pretext" for discrimination.*'" *Id.* at 660 (emphasis added). This Court thus suggested that the disparate impact doctrine was intended to address pretexts for discrimination, not mere numerical disparities.

This Court has not been consistent in stating that disparate impact is merely the manifestation of pretextual discrimination. *Griggs*, 401 U.S. at 432, found that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer had violated the statute. Yet, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court stated that a showing that other tests or selection devices were available that served the employer's legitimate business needs but did not have an undesirable racial effect would be evidence that the employer was using its tests as a pretext for discrimination. *Id.* at 425. This suggested a need to show discriminatory intent in order to invoke disparate impact analysis. *Albemarle* was followed by *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), which rejected a claim that an employer's strict drug abuse enforcement policy had a disparate impact on minorities and thereby violated Title VII. This Court ruled that the trial court's finding that the policy was not motivated by racial animus "forecloses any claim . . . that it was merely a pretext for intentional discrimination." *Id.* at 587. Again,

intentional discrimination was the necessary predicate for liability.

Next, *Connecticut v. Teal*, 457 U.S. 440 (1982), in rejecting the so-called "bottom-line" defense of racial proportionality in the workforce,[3] declared that, even if the employer shows the job relatedness of a test, "the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination." *Id.* at 447. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), cited factors such as the cost of proposed alternative employee selection devices as "relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment." *Id.* at 998.

On the other hand, *Watson* also stated that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Id.* at 987. It would thus appear that this Court has not been able to decide on the precise role of the disparate impact analysis in civil rights law. However, since the purpose of civil rights laws is to preclude intentional discrimination, the only proper basis for disparate impact analysis is when the challenged policies or acts are pretexts for discrimination.

[3] The bottom-line defense argued that if an employer achieved racial proportionality in its workforce, it did not matter if any employment or promotion practice was racially biased. *Id.* at 442.

II

THE COURTS AND ADMINISTRATIVE AGENCIES, NOT CONGRESS, HAVE EXTENDED DISPARATE IMPACT ANALYSIS TO OTHER LAWS

A. Administrative Agencies Have Expanded the Scope of Disparate Impact Analysis to Other Laws

The disparate impact doctrine was extended from Title VII to Title VI in *Lau v. Nichols*, 414 U.S. 563 (1974). There, nonEnglish-speaking students of Chinese ancestry sued San Francisco school officials alleging that the school district's failure to provide equal educational opportunities violated the Fourteenth Amendment and Title VI. *Id.* at 566. This Court did not reach the Equal Protection Clause argument but instead relied solely on Section 601 of Title VI. *Id.* Although this Court did not use the term "disparate impact," it cited Department of Health, Education & Welfare (HEW) regulations[4] issued pursuant to Section 602 that barred acts that have the effect of discrimination, even though there is no purposeful design to discriminate. *Id.* at 568.

The concurring opinion of Justice Stewart, joined by the Chief Justice and Justice Blackmun, raised a fundamental issue: "The critical question is . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601." The concurrence noted that the validity of a regulation promulgated under a general authorization provision such as Section 602 of Title VI "'will be sustained so long as it is "reasonably related to the purposes of the enabling legislation.'" *Id.* at 571 (footnote omitted).

[4] This Court also took note of HEW guidelines that required federally funded school districts to rectify students' language deficiencies. *Id.* at 566-67.

This rationale was rejected by *Alexander v. Sandoval*, 532 U.S. 275 (2001), which found that *Lau* interpreted Section 601 itself to prohibit disparate impact discrimination. *Id.* at 285. This Court then noted it

> must face now the question avoided by *Lau*, because we have since rejected *Lau's* interpretation of § 601 as reaching beyond intentional discrimination. It is clear now that the disparate-impact regulations do not simply apply § 601–since they indeed forbid conduct that § 601 permits–and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.

Id. (citation omitted). Although phrased in terms of the private right of action issue, this recognition that disparate impact regulations forbid conduct permitted by Section 601 signals that since Congress did not authorize disparate impact liability, this Court may be ready to abandon the theory, at least in Title VI cases.

B. Congress Has Limited Disparate Impact Liability

Although Congress has acknowledged the courts' imposition of disparate impact analysis on the statutory scheme of Title VII, it has shown its discomfort with the concept by moving to limit its application. For example, Title VII specifically provides that seniority systems are exempt from disparate impact in the employment context. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), held that the petitioners' allegation of a disparate impact on men and women would ordinarily suffice to state a claim under Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2), since that provision reaches " 'practices that are fair in form, but discriminatory in operation.' " *Lorance*, 490 U.S. at 904. However, *Lorance* found that the claim involved a seniority system and that

seniority systems are afforded special treatment under Title VII by reason of Section 703(h).[5] This Court concluded:

> We have construed this provision to mean that absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences. Thus, for liability to be incurred there must be a finding of actual intent to discriminate on [statutorily proscribed] grounds on the part of those who negotiated or maintained the [seniority] system.

Lorance, 490 U.S. at 905 (internal citations and quotation marks omitted; brackets in original).

Congress further attempted to restrict the use of disparate impact analysis with regard to ability tests for employment by enacting Section 703(h) which provides in part:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C § 2000e-2(h).

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[5] Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h).

Congress also addressed the use of disparate impact in test scores through the enactment of Section 703(l), entitled "Prohibition of Discriminatory Use of Test Scores":

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(l).

Thus even though cutoff scores, for example, may have a disparate impact on the basis of race or sex, employers are prohibited by Section 703(l) from adjusting those scores to achieve a more proportional result.

Congress also limited the use of disparate impact analysis by prohibiting the award of punitive damages in such cases. Thus, a plaintiff in an action brought under Section 706, 42 U.S.C. § 2000e-5 of the Civil Rights Act, may recover compensatory and punitive damages by alleging unlawful intentional discrimination but not where the charge is merely one of disparate impact. *Landgraf v. USI Film Products*, 511 U.S. 244, 252 (1994).

These provisions show that while Congress has acceded to this Court's imposition of disparate impact liability in Title VII, it has limited its application. More relevant here, there is no indication that Congress ever intended to permit expansion of the doctrine beyond Title VII to other laws such as the ADEA.

III

RECOGNIZING THE FLAWS OF DISPARATE IMPACT, THIS COURT HAS LIMITED ITS APPLICATION

Although this Court has recognized the concept of disparate impact, it has been uneasy with its application and has often sought to limit it. In *Washington v. Davis*, 426 U.S. 229 (1976), black applicants for a police training program sued alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the test on blacks as compared to whites. *Id.* at 233. This Court held that the petitioners had failed to prove a violation of the Equal Protection Clause. *Id.* at 242. This Court declared that discriminatory intent is the critical element in an equal protection claim and, though disparate impact is not irrelevant to such claim, it is not sufficient as proof of intent. *Id.*

In *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252 (1977), nonprofit housing developers planned to develop a tract of land into a racially diverse neighborhood for residents with low to moderate incomes. When the village refused to rezone the land for multifamily housing, the developers sued under the Equal Protection Clause, alleging the refusal was racially motivated. *Id.* at 258-59. This Court found that the plaintiffs had failed to prove the key element of discriminatory intent. *Id.* at 270. This Court held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264-65.

The applicability of disparate impact in cases of alleged sex discrimination was addressed in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). *Feeney* involved an equal protection claim that the award of veterans preference in employment had a disparate impact on women,

proportionably fewer of whom were veterans. This Court noted that *Washington v. Davis* and *Arlington Heights* recognized that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. But this Court found that those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results and this principle applies with equal force to a case involving alleged sex discrimination. *Id.* at 273-74. As this Court concluded:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.

Id. at 274 (internal citations and quotation marks omitted).

This Court emphasized this point in *Lewis v. Casey*, 518 U.S. 343 (1996) (involving prisoners' right of access to the courts), noting that it rejected the disparate impact theory of the Equal Protection Clause in *Washington v. Davis*.

> There we flatly rejected the idea that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. We held that, absent proof of discriminatory purpose, a law or official act does not violate the Constitution, *solely* because it has a . . . disproportionate impact.

Id. at 375 (internal citations and quotation marks omitted).

This Court read *Davis* as "acknowledging the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* (internal citations, quotation marks, and parentheses omitted).

Lewis recognized that the *Davis* Court was motivated in no small part by the potentially radical implications of the disparate-impact rationale.

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Under a disparate impact theory . . . regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. . . . [W]e rejected in *Davis* the disparate impact approach in part because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 376-77 (internal citations and quotation marks omitted).

These acknowledged dangers of the disparate impact rationale present compelling reasons for not extending the doctrine's application to the ADEA.

IV

SOUND PUBLIC POLICY REASONS REJECT EXPANSION OF DISPARATE IMPACT LIABILITY TO THE ADEA

A. Disparate Impact Liability Is Based on Unauthorized Administrative Regulations

The *Adams* Petitioners point out that disparate impact is recognized in administrative regulations implementing the ADEA. Brief for Petitioners at 34-37. This Court's growing concern with abuse of the administrative regulatory process was signaled in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). In invalidating regulations implementing Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a) (regulating the discharge of dredged and fill material into navigable waters) this Court declared:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

Solid Waste, 531 U.S. at 172-73 (citation omitted).

The disparate impact doctrine is based on the fundamental legal error that administrative regulations may interpret a law contrary to the intent of the legislative body that enacted it. In order not to invalidate a whole range of tax, welfare, public service, and regulatory acts that inadvertently may be more burdensome in their effect on older workers, Congress intended the ADEA to follow Fourteenth Amendment law and apply only to intentional discrimination. Administrative agencies

have no power to alter that policy judgment by extending the law's reach to ban programs that have a disproportionate impact on certain age groups.

B. Disparate Impact Raises the Specter of Quotas

The potential for administrative regulations to be applied in such a manner as to require the use of quotas in direct opposition to the intent of Congress and the mandate of the Fourteenth Amendment was noted with disfavor in *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 992.

> We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid "disparate impact" as such.

Id. at 992 (citation omitted).

Watson arose in the context of Title VII allegations of employment discrimination. This Court noted that preferential treatment and the use of quotas by public employers under Title VII can violate the Constitution "and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Id.* at 993 (citations omitted). This Court observed:

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation

> and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . .

Id.

The same logic applies to ADEA. Allowing this law to evolve into a mandate for age-based quotas would be contrary to Congress' clear intent.

C. Disparate Impact Is Particularly Subject to Abuse

The use of disparate impact analysis as a surrogate for quotas is only its most obvious abuse. Some plaintiffs have relied on the confusion in the courts over the disparate impact standard to pursue ends that Congress could not have contemplated. The following case studies provide examples of the risk of abuse inherent in the disparate impact doctrine.

1. *Cureton v. National Collegiate Athletic Association*

The National Collegiate Athletic Association (NCAA) is a voluntary, unincorporated association of four-year colleges and universities located throughout the United States. The members are divided for purposes of athletic competition into Divisions I, II, and III. During the 1986-87 school year, NCAA's Division I membership implemented Proposition 48 which required high school graduates to have a 2.0 grade point average (GPA) in 11 academic core courses and a minimum score of 700 on the Scholastic Aptitude Test (SAT) (or 15 on the ACT) in order to participate in Division I athletics. *Cureton v. NCAA*, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999).

Proposition 48 was modified by Proposition 16 in 1992 which increased the number of required core courses to 13 and used a sliding scale eligibility index. Four African-American student athletes who failed to achieve eligibility because they did not meet the minimum standardized test score sued the NCAA claiming that the minimum test score requirement has an unjustified disparate impact on African-Americans in violation of Title VI and implementing regulations. The United States District Court for the Eastern District of Pennsylvania agreed and granted the plaintiffs' motion for summary judgment. *Id.* at 715.

The Third Circuit reversed, but avoided a decision on the merits. Instead, the court found that the NCAA was not subject to Title VI as it was not itself (as distinct from its member colleges and universities) a recipient of federal funding. *Cureton v. NCAA*, 198 F.3d 107, 115 (3d Cir. 1999). The court, however, expressed its concern as to the scope and impact of the disparate impact doctrine.

> In reaching our result, we also point out the following. Neither Congress nor the Departments of Health and Human Services or Education has considered, at least in a formal proceeding of which we are aware, what the consequences would be if the disparate impact regulations were expanded beyond their current program specific limitations. It might well be that such expanded regulations could subject all aspects of an institution of higher education's activities to scrutiny for disparate discriminatory impact beyond anything Congress could have intended.

Id.

Judge McKee, concurring and dissenting, *id.* at 119, observed that although this dispute was framed by issues of race, the record below noted:

> Low-income student-athletes also have been impacted to a greater degree than other student-athletes by Proposition 16 standards. For example, in 1997, 18 percent of all student-athletes with a self-reported family income below $30,000 failed to qualify, whereas only 2.5 percent of student-athletes with a family income greater than $80,000 failed to qualify.

Based on this data, Judge McKee found that Proposition 16 had a disparate impact on poor student-athletes regardless of race. He concluded: "Thus, the dynamics of the disparate impact here are the dynamics of socio-economic status. These are issues of class; not race." 198 F.3d at 119. This is a distinction that has escaped the administrative agencies who have expanded the reach of the disparate impact doctrine.

In the scholastic context, the fixation on meeting race quotas while ignoring other issues such as socio-economic status has grave consequences. Using the district court's rationale, the use of the SAT to award National Merit Scholarships would violate Title VI if the awards were not precisely racially proportionate. Indeed, the use of objective standards such as the SAT and GPAs to award any type of scholarship or recognition would violate Title VI if the results did not comport with the racial profile of the test takers. The concept of subordinating individual academic excellence (or even, as in *Cureton*, bare adequacy) to racial proportionality would have a devastating effect on the motivation of high school students. Taken to its logical conclusion, the use of any cutoff point, such as a requirement of a 2.0 GPA in order to graduate from high school, would have violated the district court's interpretation of Title VI if it had a disparate impact on minorities. The district court's remedy would "dumb down" the standards so that everyone would qualify. While this would negate "disparate impact discrimination," it would also remove a significant incentive for students to apply themselves to their

studies. There had been no showing in *Cureton* that the NCAA used the SAT cutoff score as a pretext for race discrimination. In the absence of such a showing, it would have been a grave misuse of Title VI to require precise numerical proportionality for eligibility based on test results and GPA. The necessary result of such dogmatism would be to destroy the incentive of students, particularly those coming from a background of poverty, to study and prepare themselves for life after athletics.[6]

2. *Association of Mexican-American Educators v. California*

In 1983, the California Legislature amended the state Education Code to prohibit the state commission on teacher credentialing from issuing a credential for teaching in the state public schools unless the applicant has demonstrated proficiency in basic reading, writing, and mathematics skills. The Legislature further authorized the state Superintendent of Public Instruction to adopt an appropriate test to measure proficiency in these basic skills. Pursuant to that mandate, the superintendent adopted the California Basic Education Skills Test (CBEST). CBEST is a pass/fail examination comprised of three sections: reading, writing, and mathematics. The reading and mathematics sections each contain 50 multiple choice questions, 40 of which are scored. The writing section consists of two essays. Since the inception of CBEST, minority applicants have disproportionately received failing scores. *Association of Mexican-American Educators v. California*, 231 F.3d 572, 577-78 (9th Cir. 2000).

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[6] Following the adoption of Proposition 48, Division I college graduation rates for all student-athletes improved by more than 10% and the graduation rate for African-American student athletes improved by 27%. And despite the more rigorous academic standards, African-Americans were awarded 24% of the Division I athletic scholarships. Brief for Amicus Curiae National Collegiate Athletic Association in Support of Petitioners, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (No. 99-1908).

A class action was brought under Titles VI and VII on behalf of all Latinos, African-Americans, and Asians who have been, are being, or will be adversely affected by CBEST results in their ability to obtain teaching credentials. *Id.* Although based on the technical allegations that CBEST had not been properly validated, *id.* at 584, and that the cut-off score was too high, *id.* at 589, the basic thrust of the lawsuit was that the test was too hard. The Ninth Circuit, sitting en banc, found that Title VII applied, *id.* at 584, and affirmed the trial court ruling that "'the passing scores on the CBEST reflect reasonable judgments about the minimum level of basic skills competence that should be required of teachers.'" *Id.* at 590. The court could have cited, but did not, Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which provides it is not unlawful for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results, is not designed, intended, or used to discriminate on the basis of factors such as race or national origin. CBEST was developed with the assistance of the Educational Testing Service, an organization "well known and respected as a developer of standardized tests." *Association*, 231 F.3d at 588. Further, there was no suggestion that CBEST was intended to discriminate on the basis of race. The state was therefore able to avoid the embarrassment of being forced to license teachers who were themselves woefully deficient in education. However, the state did not get off unscathed. The court refused to award the state its more than $216,000 of court costs (none of which were attorneys' fees) after years of litigation. *Id.* at 591-93. Thus, even though the state ultimately prevailed, it was only at a great cost of time and taxpayers' money.

3. *African American Legal Defense Fund v. New York State Department of Education*

Another example of the use of the disparate impact standard for counterproductive purposes is *African American*

Legal Defense Fund, Inc. v. New York State Department of Education, 8 F. Supp. 2d 330 (S.D. N.Y. 1998). This lawsuit, brought under the implementing regulations to Title VI, claimed that the State of New York's statutory policy of funding the public schools based on attendance had a disparate impact on minority students because of their lower attendance rates. Since minority students were absent more frequently than nonminorities, schools with large minority populations received proportionately less state funding than schools with smaller ratios of minorities. The plaintiffs suggested that state funding be based instead on student enrollment without regard to actual attendance. *Id.* at 338. The district court, however, found that

> with respect to plaintiffs' claim that the attendance-based system of distribution has a disparate impact on minorities because of such factors as single parenting, poor housing, and medical problems, which contribute to absenteeism among inner-city students, . . . one cannot look to Title VI's regulations for remedy for any alleged disparate impact of this nature, however real and distressing. . . . [C]learly it is not [the schools'] practices that have produced the absenteeism. Accordingly, Title VI's regulations support no action at law upon those factors.

Id. at 338-39.

The court thereupon dismissed the claim. *Id.* at 339. The alternative would have been to remove the incentive for schools to discourage absenteeism on the part of minority students, a policy with disastrous import for the education of those students.

Cureton, Association of Mexican-American Educators, and *African American Legal Defense Fund* showcase the less apparent negative impact of the disparate impact doctrine. In the name of avoiding discrimination, these cases sought to

impose policies that would have had an extremely detrimental impact on society in general and minorities in particular. Dumbing down high school grade and test score requirements in *Cureton* may have made more black athletes eligible to compete at the varsity level as freshmen, but by removing the incentive to study in high school, the policy would have ensured a high failure rate for these individuals in college and ultimately in life. Dumbing down the CBEST in *Association* would have qualified more minorities to teach, but would have removed any incentive for those individuals to improve their knowledge of basic academics and would have provided an inferior education, not to mention a negative role model, for their students. Lastly, a neutral policy on minority absenteeism in the public schools, as sought in *African American Legal Defense Fund*, would send the negative message that absenteeism is an expected characteristic of minority students and therefore must be accepted.

These cases are symptomatic of the inherent problems of the disparate impact doctrine. As Judge McKee noted in *Cureton*, 198 F.3d at 119, the dynamics of disparate impact in Civil Rights Act cases are most frequently those of socio-economic status of class rather than race. Similarly, in ADEA cases, there may well be age-neutral reasons for the policy at issue.

It is time for the courts to rethink the use of disparate impact. When a disparity is caused by intentional discrimination, it should be remedied in an appropriate manner. That is what Congress intended in the enactment of the ADEA and the Civil Rights Act. But when a disparity is the result of policies that result not from intentional discrimination but from neutral factors, the courts should decline to intervene. By focusing on intentional discrimination, the courts can ensure that it is rooted out wherever it may be found. At the same time, by discarding the disparate impact doctrine, the courts can

guard against outcomes that, while well-meaning in intent, are disastrous in practice.

CONCLUSION

For the reasons stated above, the decision of the Eleventh Circuit should be affirmed.

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Respectfully submitted,

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